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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-928

UNITED STATES OF AMERICA,

*Petitioner,*

v.

NATHAN GEORGE DINITZ,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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## TABLE OF CONTENTS


*Page*

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

QUESTIONS PRESENTED ..... 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 3

STATEMENT ..... 4

SUMMARY OF ARGUMENT ..... 11

ARGUMENT ..... 13

I. THE COURT BELOW CORRECTLY CONCLUDED THAT THE ACTIONS OF THE TRIAL JUDGE TAKEN WITHOUT DEFENDANT'S PROVOCATION OR CONSENT RESULTING IN REMOVAL OF DEFENDANT'S RETAINED TRIAL COUNSEL PLACED DEFENDANT TWICE IN JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT ..... 13

A. Judicial power to remove trial attorneys from trial after jury impaneled is not absolute ..... 14

B. The prohibition against being placed twice in jeopardy is a constitutional right and not a procedural mandate of an accused ..... 20

C. Assuming defendant moved for a mistrial, such motion is immaterial in view of the trial court's prior *sua sponte* act of removing trial counsel ..... 31

Page

II. THE COURT BELOW CORRECTLY CONCLUDED THAT A MANIFEST NECESSITY TO DECLARE A MISTRIAL DID NOT EXIST AND THAT JUDICIAL ERROR ALONE TOOK AWAY DEFENDANT'S VALUED RIGHT UNDER THE FIFTH AMENDMENT TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL ..... 38

CONCLUSION ..... 50

## TABLE OF AUTHORITIES

*Cases:*

Armentrout v. State, 15 N.E.2d 363 (Ind. 1938) ..... 49

Brown v. United States, 356 U.S. 148 (1958) ..... 16, 51

Carsey v. United States, 392 F.2d 810 (D.C. Cir. 1967) ..... 15, 49

Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963) ..... 30-31

Downum v. United States, 372 U.S. 734 (1963) ..... *passim*

Drope v. Missouri, ____ U.S. ____ 95 S. Ct. 896 (1975) ..... 29

Espinoza v. District Court, 506 P.2d 131 (Colo. 1973) ..... 49, 54

Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1874) ..... 20

Gideon v. Wainwright, 372 U.S. 335 (1963) ..... 42

Glasser v. United States, 315 U.S. 60 (1942) ..... 25, 26, 29

Gori v. United States, 367 U.S. 364 (1961) . 22, 23, 39, 41, 43

Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968) ..... 17, 18

Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) ..... 51

Huffman v. Pursue, ____ U.S. ____ 95 S. Ct. 1200 (1975) ..... 42



Page

Illinois v. Allen, 397 U.S. 337 (1970) ..... 16, 40

Illinois v. Somerville, 410 U.S. 458 (1973) ..... *passim*

In Re Dellinger, 461 F.2d 389 (7th Cir. 1972) ..... 15, 16

In Re Hallinan, 81 Cal. Rep. 1, 459 P.2d 255 (1969) ..... 16

In Re Little, 404 U.S. 553 (1972) ..... 16

In Re McConnell, 370 U.S. 230 (1962) ..... 19-20

Johnson v. Zerbst, 304 U.S. 458 (1938) ..... 29, 31, 51

Lewis v. State, 452 P.2d 892 (Alaska 1969) ..... 54

Lillard v. Commonwealth, 267 S.W.2d 712 (Ky. 1954) ..... 54

Logan v. United States, 144 U.S. 263 (1892) ..... 43

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) ..... 16, 40

McCabe v. Bronx County Court, 199 NYS 2d 247 (1960) ..... 54

McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960) *Cert denied*, 368 U.S. 877 (1961) ..... 25

McKissick v. United States, 379 F.2d 754 (5th Cir. 1967) ..... 29

McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973) *Cert. denied* 415 U.S. 951 (1974) ..... 49

Porter v. United States, 298 F.2d 461 (5th Cir. 1962) ..... 30

Roberts v. United States, 477 F.2d 544 (8th Cir. 1973) ..... 34

Serfass v. United States, ____ U.S. ____, 95 S. Ct. 1055 (1975) ..... 21, 32

Simmons v. United States, 142 U.S. 148 (1891) ..... 43

Simmons v. United States, 390 U.S. 377 (1968) ..... 37

Sprinkle v. Davis, 111 F.2d 925 (4th Cir. 1940) ..... 16

Steinberg v. United States, 162 F.2d 120 (5th Cir. 1947) ..... 16

Page

State v. Burrvell, 401 P.2d 733 (Ariz. 1965) ..... 49

State v. Turpin, 54 Or. 367, 103 Pac. 438 (1909) ..... 54

State v. Whitman, 74 P.2d 696 (Utah 1937) .....49, 54

Thomas v. Beasley, 491 F.2d 507 (6th Cir. 1974) ..... 49

Thompson v. United States, 155 U.S. 271 (1894) ..... 43

United States v. Aurbach, 420 F.2d 921 (5th Cir. 1969) .....29, 51

United States v. Ball, 163 U.S. 662 (1896) ..... 21, 26, 45

United States v. Dinitz, 492 F.2d 53 (5th Cir. 1974) ..... *passim*

United States v. Dinitz, 504 F.2d 854 (5th Cir. 1974) (*en banc*) .....2, 9-10, 37

United States v. Glassel, 488 F.2d 143 (9th Cir. 1973) ..... 5

United States v. Henderson, 439 F.2d 531 (D.C. Cir. 1970) .....34

United States v. Jorn, 400 U.S. 470 (1971) ..... *passim*

United States v. Kwitek, 467 F.2d 222 (7th Cir.) *Cert. denied* 409 U.S. 1079 (1972) ..... 34

United States ex rel Montgomery v. Brierly, 414 F.2d 552 (3rd Cir. 1969) ..... 34

United States v. Pappas, 445 F.2d 1194 (3rd Cir.), *Cert. denied*, 404 U.S. 984 (1971) ..... 23

United States v. Perez, 22 U.S. (9 Wheat) 579 (1824) .....*passim*

United States ex rel Russo v. Superior Court of New Jersey, 483 F.2d 7 (3rd Cir.) *Cert. denied* 414 U.S. 1023 (1973) ..... 40, 49, 55

United States v. Seale, 461 F.2d 345 (7th Cir. 1972) ..... 40

United States v. Sopher, 347 F.2d 415 (7th Cir. 1965) ..... 16



Page

United States v. Tateo, 377 U.S. 463 (1964) .....*passim*

United States v. Whitlow, 110 F. Supp. 871 (D.D.C. 1953) ..... 36, 49, 54

Von Moltke v. Gillies, 332 U.S. 708 (1948) ..... 30

Wade v. Hunter, 336 U.S. 684 (1949) .....22, 27, 38, 42, 43

*Constitution and Statutes:*

United States Constitution:

Fifth Amendment .....*passim*

Sixth Amendment .....*passim*

*United States Code:*

18 U.S.C. § 401(1) .....15

21 U.S.C. § 841(a)(1) ..... 4

21 U.S.C. § 846 ..... 4

28 U.S.C. § 1254(a) ..... 2

*Rules:*

Rule 7, Fifth Circuit Plan Under the Criminal Justice Act ..... 9

*Miscellaneous:*

Atlas, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 Tex. L. Rev. 303 (1974) .....20

Blackstone, *Commentaries* ..... 20, 21

Friedland, *Double Jeopardy*, (1969) .....20

Jaworski, *Judicial Intimidation: A Threat to the Advocate's Independence*, 1 Litigation 11 (Winter 1975) .....32

Note, *Double Jeopardy: The Reprosecution Problem*, 77 Harv. L. Rev. 1272 (1964) ..... 20, 21

Note, *Mistrial and Double Jeopardy*, 49 N.Y.U.L. Rev. 937 (1974) .....40

Note, *Twice In Jeopardy* 75 Yale L. Jo. 262 (1965) .....21

Sigler, *Double Jeopardy* (1969) .....20

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## BRIEF FOR THE RESPONDENT

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## OPINIONS BELOW

The initial opinion of the Court of Appeals (Pet. App. A, 1a-25a)[1] is reported at 492 F.2d 53 (5th Cir.

[1] "Pet.App." refers to the Government's petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Other references are as follows: "App." denotes the separately bound appendix. "Pet. brief" refers to the brief for the United States.

1974). The *per curiam* opinion of the Court of Appeals *en banc* (Pet. App. B, 26a-28a) is reported at 504 F.2d 854 (5th Cir. 1974). The opinion of the District Court (Pet. App. D, 31a-37a) is unreported.

The appeal taken February 15, 1973 from the order of the trial judge banishing defendant's trial counsel (5th Cir. No. 731395) was mooted by the subsequent declaration of mistrial. No opinion was filed (App. 38).

## JURISDICTION

The judgment of the Court of Appeals *en banc* (Pet. App. C, 29a-30a) was entered on November 27, 1974. By order of December 23, 1974, Mr. Justice Powell extended the time for filing a petition for a Writ of Certiorari to and including January 26, 1975, and granted on March 31, 1975 (App. 45). The jurisdiction of this Court rests upon 28 U.S.C. 1254(a).



## QUESTIONS PRESENTED

1. WHETHER THE DEFENDANT WAIVED HIS RIGHT TO PROCEED BEFORE THE EMPANELED JURY, AFTER THE TRIAL JUDGE HAD REMOVED THE DEFENDANT'S TRIAL COUNSEL AND THREATENED DISBARMENT AGAINST THE DEFENDANT'S REMAINING COUNSEL IF HE PROCEEDS ALONG THE SAME LINE IN PRESENTING HIS DEFENSE THEORIES.
2. WHETHER, ASSUMING THE DEFENDANT DID WAIVE HIS RIGHT TO PROCEED BEFORE THE EMPANELED JURY, THE IMPROPER ACTIONS OF THE TRIAL JUDGE ALONE CREATED THE NEED FOR SUCH WAIVER.
3. WHETHER A DEFENSE COUNSEL'S PROFFER OF A THEORY OF DEFENSE, MADE OUTSIDE THE PRESENCE OF THE JURY, CONSTITUTES GROUNDS FOR DISBARRING AND BANISHING THAT COUNSEL FROM THE COURTROOM THUS CREATING A MANIFEST NECESSITY FOR A MISTRIAL.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> . . . In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

## STATEMENT

The respondent, Nathan George Dinitz, (hereinafter referred to as defendant) was charged with violating 21 U.S.C. § 841(a) and 21 U.S.C. § 846: conspiring to distribute and distributing a schedule 1 controlled substance. On the day of his arrest the defendant retained local counsel, Jeffrey Meldon, Esquire, to conduct his pre-trial defense until he could find an experienced criminal trial lawyer to conduct his trial defense.

Some time before trial was scheduled to begin, Mr. Dinitz retained Maurice Wagner, Esq. to conduct his trial defense. Although Mr. Wagner is a member of the bar of the United States District Court of the Middle District of Florida, and of the Southern District of Florida, (App. 19) he was not a member of the bar of the Northern District of Florida. However, he was admitted by the trial court, and was recognized by the trial court as defendant's trial counsel. (Pet. App. 35a).[2]

On February 14, 1973, a jury was selected and duly impaneled, and the witnesses sworn. On February 15, 1973, trial began. The next day the trial began with a hearing held outside the presence of the jury, on defendant's motion to suppress. (App. 6). During this hearing the Court engaged in its first exchange with Mr.

[2] Also present for defendant were Jeffrey Meldon and Fletcher Baldwin, a professor of law at the University of Florida. Mr. Baldwin advised at the outset of proceedings that he was not a trial attorney and would not participate in the trial.



Wagner by informing him that he would be removed from the courtroom if he continued to present the motion in an argumentative fashion (App. 13). The motion to suppress was denied,[3] and the jury was called into the courtroom. At the conclusion of the Government's opening statement – which included personal opinions and final arguments without rebuke by the trial judge (App. 19) – Mr. Wagner delivered his opening statement. He proceeded without objection until he told the jury that he would call this "the case of the incredible witness" (App. 20). A Government objection to personal opinion was sustained, Mr. Wagner apologized. At that point the jury was removed. (App. 20)

Outside of the presence of the jury, the judge accused Mr. Wagner of baiting the court and issued the second threat of removal (App. 21). The jury was then recalled into the courtroom.

The second time the jury was removed involved a Government objection that Mr. Wagner was presenting a final argument; the jury was promptly removed and the objection immediately sustained. (App. 22) When the jury returned, Mr. Wagner apologized. (App. 22)

The third and final removal of the jury occurred when the Government objected to Mr. Wagner's statement: "some week or ten days later, Nat (Dinitz)

[3] The trial judge was annoyed by Mr. Wagner for submitting many motions, and by the motion to suppress because he considered it frivolous (App. 21). It is noted that a similar motion was presented and considered at length by the Ninth Circuit Court of Appeals, and ultimately denied. *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973).

began to get telephone calls offering ____." (App. 29) The jury was removed, and in absence the court asked Mr. Wagner what he was going to discuss. (App. 29) Mr. Wagner explained that he was going to discuss an extortion attempt against Mr. Dinitz, whereupon the court demanded that he demonstrate proof that the informer, Mr. Cox, was the man who picked up the extortion envelope. (App. 30)[4] Without allowing Mr. Wagner to present his theory as to the relevancy of this information, without allowing him to complete the proffer ordered by the court, and without ruling on the relevancy of the attempted proffer, (App. 30-32) the court expelled Mr. Wagner from the courtroom, stating:

> The Court: You will leave the courtroom immediately and you will never practice law in this court again, Mr. Wagner. I direct you to leave now. Mr. Marshall, see that he leaves the building immediately . . . (Wagner departs). This is the worst exhibition I have ever heard of since I have sat on the bench. It is plain character assassination . . . (App. 32-33)

Once Mr. Wagner had been removed, the trial judge turned his attention to Mr. Meldon, the attorney retained to perfect Mr. Dinitz's pre-trial motions questioning Mr. Meldon's complicity in assisting Mr. Wagner's preparations for trial. After the Assistant United States Attorney interjected that Mr. Meldon might well have been aware in advance of Mr. Wagner's

[4]It does not appear that the trial judge considered any evidence or testimony on the matter of the identity of the man who picked up the envelope, prior to banishing Mr. Wagner from the courtroom. (App. 32-33) (Pet. App. 17a-fn. 11).



intended trial tactics, (App. 33) the court then continued to address Mr. Meldon as follows:

> The Court: All right, convince me, Mr. Meldon, that you had no control over Mr. Wagner. You were the lead counsel in this case. Apparently, you called him in to be associated with you. Explain to me that you had no control over his activities and had no knowledge that he was planning to present this case in this manner. (App. 34).

Mr. Meldon denied being a party to the preparation and further stated that he was unprepared to try the case. The court proceeded to threaten Meldon with removal – no other disciplinary action was ever discussed – unless Meldon could convince the court that he did not aid Wagner in preparing the opening statement. Meldon continued denying complicity and stated further that he had not been retained to conduct the trial defense, that he was not prepared, and finally that defendant Mr. Dinitz did not want to be represented by him. Although the trial judge would later agree with Mr. Meldon (Pet. App. 31a-37a), he nevertheless ordered Meldon to be ready to proceed the next morning (App. 34-35)

The fact that Mr. Meldon wished to be removed from the case became obvious the next morning when he appeared at an in-chambers hearing from which the defendant was excluded and stated (1) the defendant did not want him, as trial counsel; (2) he was not prepared, and; (3) he *did not want* to try the case (App. 37). Whether intended or not, the court had caused Mr. Meldon to be placed in the untenable position of expressing divided loyalties. Thus, after Wagner was removed, it was apparent even to the court

that Mr. Dinitz was without any counsel able to proceed with an uncompromised defense. (Pet. App. 35A)

During the in-chambers proceeding *after* Mr. Meldon had informed the court that he could not proceed, the court discussed mistrial. "I am seriously considering granting a mistrial because of the fact that the Government nor defendant could get a fair trial." (App. 40) After suggesting the idea for a mistrial, the court recessed the hearing. When the hearing resumed, Mr. Meldon stated that the had spoken to the defendant and, after a full consideration of the situation, desired to move for a mistrial. A mistrial was declared. (App. 42) The Order granting a mistrial stated the following reasons: (1) Mr. Wagner had made improper comments before the jury had prepared to argue that the respondent was the victim of an extortion attempt by the principal government witness (Pet. App. 33a; App. 39); (2) Co-counsel Meldon was unwilling and unprepared to represent the defendant any further (Pet. App. 33a-34a); (3) it appeared from Mr. Meldon's statements that the respondent did not wish Mr. Meldon to further represent him (Pet. App. 34a-35a); (4) the court felt that the respondent might possibly be prejudiced by the absence of his chief counsel (Pet. App. 35a); (5) there was a possibility of adverse publicity concerning the case (App. 40); (6) the forceable removal of Mr. Wagner by the court during his proffer of evidence created a situation where it was a manifest necessity to declare a mistrial (Pet. App. 35a-36a; App. 42).

On February 23, 1973, Mr. Meldon moved to withdraw as counsel for defendant (App. 43). A hearing was held on the motion, (App. 43-44) and the motion



was granted on February 23, 1973. (App. 43) On February 26, 1973, the defendant moved to dismiss the indictment on the ground that denial of his trial counsel placed him twice in jeopardy and therefore precluded retrial. (Defendant's motions for reinstatement of Attorney Maurice Wagner and to Dismiss (App. 2). The defendant alternatively moved to have his counsel, Maurice Wagner, reinstated. (Id.) Both motions were denied, (March 26, 1973 entry, App. 2; Pet. App. 36a) and on April 17, 1973, the defendant, without assistance of counsel was convicted of both counts charged. (April 16, and April 17 entry, App. 2) An appeal notice was timely filed by the defendant (May 15, 1973 entry, App. 2)

Pursuant to the Fifth Circuit Court of Appeals Rule 7, *Fifth Circuit Plan Under the Criminal Justice Act* an attorney, Fletcher N. Baldwin, Jr., was appointed June 11, 1973 to perfect respondent's appeal. A divided panel of the Fifth Circuit Court of Appeals reversed respondent's conviction (Pet. App. A. pp. 1a-25a). After granting the Government's motion for rehearing *en banc*, the full court affirmed the panel's decision (Pet. App. pp. 26a-28a). The position of the majority of the appellate court was that defendant's claim of double jeopardy revolved around two distinct factual issues: first, the threshold issue of whether on the *unique facts* of this case the defendant involuntarily waived his right not to be twice in jeopardy; and, second, if it were not defendant's motion, whether the courts declaration of the mistrial was justified by manifest necessity. With respect to the first issue, the panel held that the actions of the trial judge in banishing defendant's trial counsel and threatening to take similar action against the

remaining co-counsel, coupled with co-counsel's lack of preparation, court's failure to consider alternatives, and defendant's refusal to be represented by co-counsel Meldon, gave defendant no choice but to move for a mistrial. "Under circumstances of this case . . . respondent can hardly be said to have relinquished voluntarily his right to proceed before the first jury." *United States v. Dinitz*, (Pet. App. 13a-14a).

In considering the second issue, the panel pointed out that "usually the declaration of the mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result appellate court normally tests to determine whether the precipitating event created a requisite manifest necessity to abort the trial." (Pet. App. 12A) On the "unique facts" of this case, however, the panel declined to focus its inquiry on the circumstances that existed when the mistrial was declared. Because the die was cast with the trial judge's response to the conduct of defense counsel, the panel held that appellate review must be focused on Wagner's expulstion rather than on the subsequent declaration of a mistrial. The panel then concluded that means of dealing with Wagner's conduct short of excluding him from the trial had been available to the trial judge, and that these alternatives should have been, but were not, considered. Thus, in the view of the majority of the panel, as affirmed *en banc*, (Pet. App. 26a-28a) the action of the trial judge in excluding Wagner, threatening Meldon, and refusing to consider alternatives was an abuse of discretion, and the *sua sponte* mistrial barred renewed prosecution of defendant.



A dissenting member of the panel, and the dissenting members of the *en banc* opinion, rejected as too extreme to be workable, the majority views that the judge's declaration of a mistrial operated to bar defendant's subsequent trial. The dissenting judge determined from the record that the facts showed the motion for mistrial had been voluntarily made, therefore the court should have applied the judicial over-reaching standard and not the abuse of discretion standard.

## SUMMARY OF ARGUMENT

The Fifth Amendment protection against double jeopardy is motivated by the desire to avoid subjecting an accused to multiple jeopardy. The mandate of the Fifth Amendment is to insure the reliability of guilt determination.

However, jeopardy may be prevented from attaching where (1) the defendant intelligently waives his right to be tried before a duly empaneled jury, or (2) where the ends of public justice would not be served by strictly adhering to the double jeopardy prohibition. To determine whether the "ends of public justice" exception is operable, this court must conclude from the facts in the instant case that a manifest necessity existed. Otherwise, reprosecution is barred by the command of not placing one twice in jeopardy.

Thus the question presented in this case is whether the trial judge's discharge of defendant's trial counsel was sufficient ground for later dismissal of the jury. In the trial court's opinion the action was proper because:

(A) consent to the mistrial by the defendant waived any Sixth Amendment claim, thus paving the way for a retrial, or if actual consent did not exist (B) a manifest necessity existed whereby the judge on his own motion declared the mistrial.

(A) In determining whether defendant's consent waived his double jeopardy protection, this Court must consider whether the consent was the result of a meaningful choice or whether the "consent" was not consent at all. It is defendant's position that the action of the trial judge in removing defendant's trial attorney during a proffer, and in refusing at any time to consider alternatives to such an extreme act, bars a subsequent trial.

(B) The trial judge in his order concluded that a manifest necessity existed whereby the ends of public justice could not be served unless a mistrial were declared. Neither the facts of this case nor the opinions of this Court support the trial judge's conclusion that a manifest necessity existed.

The trial judge by his own motion violated defendant's right to counsel under the Sixth Amendment and then tried to cure such violation by declaring a mistrial in hopes that such declaration would right the wrong done to defendant. It is defendant's position that judicial error alone rather than the defendant's exercise of any option to stop or go forward, took away his "valued right" to have his trial completed by a particular tribunal. Therefore, the Fifth Circuit Court of Appeals was correct in barring a retrial on the ground that double jeopardy had attached.



## ARGUMENT

### I.

### THE COURT BELOW CORRECTLY CONCLUDED THAT THE ACTIONS OF THE TRIAL JUDGE, TAKEN WITHOUT DEFENDANT'S PROVOCATION OR CONSENT RESULTING IN REMOVAL OF DEFENDANT'S RETAINED TRIAL COUNSEL, PLACED DEFENDANT TWICE IN JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT.

The mistrial declared in this case stemmed directly from the action of the trial judge in disbarring defendant's trial counsel during his Court requested proffer (App. 29). The trial court stated that the action of defendant's trial counsel created a situation which resulted in a manifest necessity to declare a mistrial (Pet. App. 35a). In brief, a mistrial was declared because of the trial judge's concern for possible prejudice arising from Mr. Wagner's opening statement, proffer and ultimate removal. (Pet. App. 33a-35a) The removal of defendant's trial counsel left defendant without effective assistance of counsel of choice, the choice of counsel and trial strategy having been dictated by the trial court. The only remaining retained counsel, Jeffrey Meldon, Esq., pointed out to the court that (1) he was unprepared to go forward (App. 34), (2) he wanted to withdraw from the case (App. 37), and (3) the defendant did not wish him to continue. (App. 37). A mistrial under such conditions placed defendant twice in jeopardy when he was then forced to proceed to a second trial with a newly impaneled jury.

**A. Judicial Power to Remove Trial Attorneys After Jury Has Been Impaneled is Not Absolute.**

Removal of a trial counsel in a criminal case is an extreme measure and not to be taken lightly. The act of removal leaves an accused at the mercy of the Government; this was especially so in the instant case where all of defendant's funds were exhausted in employing his trial counsel. (App. 43).

When Mr. Wagner, the trial attorney for the defendant, was ordered removed from the trial, the focus of the trial judge was upon the trial defense counsel and not upon the defendant. (The Court: You will leave this courtroom immediately and you will never practice law in this court again Mr. Wagner .... Mr. Marshal see that he leaves the building immediately) (App. 32). The focus should have been upon the protection of the due process rights of the defendant.

The usurpation by a trial judge of the freedom to choose counsel, or the substitution by the court of its judgment for proper avenues of defense, cannot be authorized by the Constitution. The policy against arbitrary control of choice of counsel and choice of strategy and tactics to be taken in defense of the client is necessarily compelling in a criminal case, in view of what a defendant stands to lose should his confrontation with society be unsuccessful.

The scope of a court's discretion with regard to the Sixth Amendment right to counsel must have some limit. A defendant must be afforded a fair opportunity to obtain counsel of choice, and effective use of chosen



counsel cannot be prohibited by arbitrary determinations of proper defense strategy, allowing only that which will not offend the sensibilities of the trial judge. In the instant case, the action of the trial judge in removing trial counsel without considering the alternatives or the consequences, left the defendant penniless and thus at the mercy of the trial court. (R. 82-83) Whether the trial judge had anticipated the impact of his act upon the defendant is not, as the government suggests, the issue. The Constitution anticipated such results and, therefore, requires a greater showing of harm before such an act will be permitted. Indeed, all events flowing from the arbitrary removal had the effect of the trial court substituting its own judgment for that of the defendant. See *Carsey v. United States*, 392 F.2d 810, 813 (D.C. Cir. 1967) (Leventhal, J. Concurring).

The action of the trial court was clearly too drastic, since lesser sanctions were available for controlling the tempo of the trial. Other options included (1) contempt in accordance with 18 U.S.C. § 401(1)[5]; *In re Dellinger*, 461 F.2d 389, 397 (7th Cir. 1972); (2) suspension for a limited period of time, or if it appeared that the court was no longer disinterested and becoming personally embroiled with the trial counsel then perhaps (3) a hearing conducted by a detached judge to determine

[5] It is respectfully suggested that contempt, or the threat of contempt, with its judicial safeguards, would not have disabled Mr. Wagner or Mr. Meldon. But the Damocles sword of disbarment by fiat disabled Meldon from representing the defendant, as completely as the actual disbarment of Wagner by fiat disabled him from representing the defendant in this case.

the gravity of the attorney's conduct. With the implementation of one of these options, the right of the defendant to retain counsel of choice would have been preserved. Cf., *Illinois v. Allen*, 397 U.S. 337 (1970), and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

In *In re Little*, 404 U.S. 553 (1972) the defendant, representing himself *pro se*, was found in contempt by the trial court. In summation he told the jury that the court was biased and had prejudged his case, and that furthermore, he was a political prisoner. This court reversed the decision and held that the defendant acting as his own counsel should be allowed the same rights that are allowed an attorney before he is convicted of contempt, and since his statements were neither boisterous nor in any way disruptive of the proceedings, he should not have been found in contempt. "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown v. United States*, 356 U.S. 148, 153 (1958). See also, *In re Hallinan*, 81 Cal. Rep. 1; 459 P.2d 255 (1969); *Steinberg v. United States*, 162 F.2d 120 (5th Cir. 1947); *In re Dellinger, supra; United States v. Sopher*, 347 F.2d 415 (7th Cir. 1965); *Sprinkle v. Davis*, 111 F.2d 925 (4th Cir. 1940)

The trial court in the instant case ignored the lack of the requisite elements of contempt; so too it ignored its contempt powers by resorting to a far more serious sanction. All statements considered by the trial court to be beyond the bounds of proper trial tactics were presented during proffer and while the jury was out of the courtroom. The alleged courtroom misconduct that the jury was actually exposed to was: MR. WAGNER:



"I call this the Case of the Incredible Witness" (App. 20); and a reference by Mr. Wagner to the fact that the defendant "began to get telephone calls offering —" (App. 29). This served as the basis for Mr. Wagner's removal.

In *Harris v. United States*, 402 F.2d 656 (D.C. Cir. 1968), the court addressed itself to the kind of action the trial judge should take when an attorney makes what the court perceives to be improper comments. In *Harris* the comments were made during closing arguments before the jury, in the instant case the comments were made outside the presence of the jury. The defendant in *Harris* appealed his conviction on the grounds that the prosecutor had made comments to the jury which asserted the prosecutor's personal opinion of the defendant's guilt and that the trial court should have interrupted. The prosecutor stated that defendant's story "reeks of fabrication," "it is a lie," "if you really believe that, he is pulling the wool over your eyes." Besides holding that these statements were insufficient grounds for reversal, the court refused to criticize the trial judge for not interrupting. In footnote one of the opinion the court fully discussed the problem of improper comments by a trial attorney:

> [The] trial judge should not interrupt every argument he thinks undesirable. Here as in other areas there are "gray zones" of argument which, *though they should not be made, do not warrant interruption and would not support a mistrial.* The problem is one of balance; a serious transgression is impermissible, and it is as to these that *intervention* by the trial judge is called for other deviations can be dealt with by the trial judge's post-trial admonition. *Id.* at 657 [emphasis added]

In the instant case, as in *Harris*, the action of defendant's trial attorney was not sufficient to warrant his exclusion during defendant's trial. During his opening statements to the jury, defendant's trial attorney began discussing the case up to the point in time of defendant's arrest, he stated: "Some week or ten days later Nat began to get telephone calls offering –" whereupon the Government objected and the jury was removed. (App. 29). The court asked defendant's attorney what he planned to say next (App. 29). Defendant's trial attorney explained that he was going to mention that an extortion attempt, investigated by the F.B.I., was made on the defendant about a week or ten days after defendant's arrest; that the extortionist claimed he could have the charges against defendant dropped in exchange for $2,000.00 (App. 29-31). With the jury still out the court demanded that Mr. Wagner connect the extortion attempt to the government informer, Mr. Cox, and further stated: "If you cannot convince me this testimony is admissible, you will leave this courthouse today." (App. 31). The "testimony" referred to by the Court was that of the F.B.I. agents who investigated the attempted extortion. Defendant's attorney stated that he had never personally spoken to the F.B.I. agents, but that he did have evidence, (App. 31). The Court asked him where he got the evidence. (App. 31-32). Defendant's attorney replied, "Mr. Meldon, Mr. –" (App. 31-32). The court then inquired of Mr. Meldon as to whether the F.B.I. had revealed to him any connection between the extortion and the Government witness. (App. 32). Mr. Meldon denied having received such information or having conveyed it to Mr. Wagner. (App. 32). On this basis, without



inquiring any further of Mr. Wagner, the Court expelled him from the Courtroom and instructed him not to return. (App. 33). The trial court did not allow Mr. Wagner to continue, and, as the court below noted, the removal seemed related more to a basic misunderstanding between judge and attorney concerning their interpretations of how this material would be relevant, than to concern for what the jury heard or the possible obstruction or taint of the trial. For example: (1) the court's evaluation of the expected testimony of the F.B.I. agents was based entirely on the word of Mr. Meldon, even though Mr. Wagner had begun to mention another name during his proffer. (App. 31) and (2) the action was taken entirely on the trial judge's conception of what Mr. Wagner "intended to say to the jury". The judge could readily have prevented this intention from becoming a reality by admonishing or holding in contempt. As this Court stated in *In re McConnell*, 370 U.S. 230 (1962):

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty . . . .
>
> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous independent bar are both indispensable parts of our system of justice. To preserve the

> kind of trials that our system envisages, Congress has limited the summary of contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice .... *Id.* at 236.

As the Appeals Court noted below, the action by the trial court in removing Mr. Wagner was an abuse of the power of that court. Failure to consider alternatives in order to insure the rights of the defendant resulted in a Hobson's choice of continuing without an experienced trial counsel of choice or aborting the trial; such choice is no choice at all.

### B. The prohibition against being placed twice in jeopardy is a Constitutional right and Not a Procedural Rule.

The concept of prohibiting the state from placing one twice in jeopardy evolved from the English common law. 4 W. Blackstone, Commentaries, 335-338; M. Friedland, *Double Jeopardy*, 5-7 (1969); J. Sigler, *Double Jeopardy* 16-21 (1969). In this country the early concept of double jeopardy stressed the fact that a second trial was forbidden, whether the accused had suffered punishment or not. *Ex parte Lange*, 85 U.S. (18 Wall) 163, 168-169 (1874). The prohibition against double jeopardy was an attempt to avoid subjecting a defendant to the gauntlet of multiple prosecutions until a verdict of guilty could be achieved. It was, and is, an attempt to insure the reliability of the guilt determining process. Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1274 (1964). See generally, Atlas, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 Tex. L. Rev. 303 (1974) and Comment, *Twice In Jeopardy*, 75 Yale L. Jd. 262 (1965).



The balance between society's interest in convicting criminal deviants and a defendant's interest in being subjected to jeopardy only once was struck in the Fifth Amendment. The question for the early interpreters of the double jeopardy clause was whether the prohibition should be limited, as at common law, to felony prosecutions which had proceeded to final judgment. 4 W Blackstone, Commentaries 335-336. This Court in 1824 rejected such a limit upon twice being placed in jeopardy *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), suggesting that the double jeopardy prohibition might prevent retrial where certain types of activity result in a mistrial. The suggestion in *United States v. Perez* became a constitutional principle in *United States v. Ball*, 163 U.S. 662, (1896) wherein this Court interpreted the double jeopardy clause as a "prohibition ... not against being twice punished, but against being twice put in jeopardy." *Id.* at 669. Furthermore, the clear position of this Court has been and continues to be that jeopardy attaches once the jury has been impaneled and sworn. *Serfass v. United States*, ____ U.S. ____, 95 S. Ct. 1055 (1975). *United States v. Jorn*, 400 U.S. 470, 479 (1971); *Downum v. United States*, 372 U.S. 734 (1963). See also Note, *Double Jeopardy: The Reprosecution Problem, Supra* at 1275-1276. As this Court has noted in numerous cases, the rationale behind jeopardy attaching once the jury has been impaneled and sworn is a concern for the defendant's interest in having his trial completed by one tribunal, not being harassed by repeated prosecutions,

and not being subjected to continuing expense, embarrassment, and anxiety. *United States v. Jorn, supra,* at 479-480; *Downum v. United States,* 372 U.S. 734, 736, (1963) and *Gori v. United States,* 367 U.S. 364, 369 (1961). However, since *Perez,* this Court has also recognized the concomitant interest of the government in achieving just verdicts. See *Wade v. Hunter,* 336 U.S. 684, 689 (1949). Therefore, double jeopardy as a defense will not bar reprosecution in all aborted trials. As this Court noted in *United States v. Perez, supra*:

> We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . but, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office . . . *Id.* at 580.

In the above excerpt from *Perez* Mr. Justice Story rejected a rigid approach to double jeopardy issues. Rather, he articulated a general standard designed to discourage declarations of mistrial. The *Perez* rationale has been approved by this Court ever since 1824.



However, one of the major area of confusion concerns the amount of discretion granted to a trial judge under the doctrine of manifest necessity. (See Argument II, *Infra.*) [Compare *Gori v. United States,* 367 U.S. 364 (1961) *with United States v. Jorn, Supra.*] To avoid such confusion, courts adopted the position that short of a clear showing of manifest necessity, a motion for a mistrial by a defendant will normally be treated as a waiver of a double jeopardy claim. *United States v. Pappas,* 445 F.2d 1194, 1199-1200 (3rd Cir.), *cert. denied,* 404 U.S. 984 (1971).

In this case the Government finds both elements present arguing (1) that the defendant moved, freely and voluntarily for a mistrial and (2) in the alternative, a manifest necessity existed for the judicial declaration of a mistrial (See Argument II, *Infra*). The facts in this case, however, support the conclusion that the declaration of the mistrial was a discretionary act on the part of the trial judge prompted by judicial transgressions far exceeding the bounds of inadvertence. The commission by the trial judge of an avoidable fundamental error followed by little or no evidence of an evaluation by the judge of curative procedures (App. 41) created a situation in which the valued right of the defendant to have his trial completed by a particular tribunal had been usurped by the government acting through its agent, the trial judge. The trial judge in the case at bar ordered defendant's retained and recognized trial counsel (Pet. App. 35a) removed from the courtroom while he was presenting a legitimate argument on behalf of defendant, at the insistence of the trial judge and after the jury had been removed (App. 29). The argument pertained to the admissibility

of certain evidence which the trial counsel was prepared to develop in his opening statement. The proffer that resulted in the removal of Mr. Wagner was not in the presence of the jury (App. 29). Furthermore, the record indicates that at that particular point in time and throughout his brief participation in the trial, defendant's trial counsel was courteous and at no time caused any disruption in the courtroom.

Following the removal of defendant's trial counsel, a motion for mistrial was discussed. The suggestion of mistrial was made by the trial judge (App. 40) to Mr. Meldon, a local attorney hired by the defendant prior to retaining the more experienced trial counsel. Mr. Meldon agreed to submit such motion on behalf of the defendant. It should be noted that although Mr. Meldon appears on the record as an attorney for the Defendant, the record demonstrates that the defendant did not intend to be and was not represented by Mr. Meldon for purposes of the trial. This is clearly shown by statements made by Mr. Meldon and the defendant. Mr. Meldon had not participated in the preparation of the trial. (App. 33-35, 37) The defendant did not wish to be represented by Mr. Meldon: Mr. Meldon indicated that he wished to withdraw from the case. (App. 37-38) The trial court recognized this fact when it noted: "Dinitz was *essentially without counsel* before a jury which possibly had been prejudiced by the inappropriate conduct and the resultant absence of defendant's chief trial counsel." (Pet. App. 35a) (Emphasis added) Yet, the critical decision whether to accept the court's suggestion to move for mistrial was made by Mr. Meldon in-chambers outside the presence of the defendant. Mr. Meldon could not at that point make



such a representation on behalf of the defendant because the defendant had expressed a desire not to be represented by Mr. Meldon (App. 37-39). See, *McKenna v. Ellis*, 28 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

Contrary to the government's argument that defendant could have sought a continuance (Pet. brief 29) at the point of removal of defendant's trial counsel, the court instructed Mr. Meldon to be ready to conduct the defense in less than twenty-four hours. (App. 34-35). This instruction was made after the court had been apprised that Mr. Meldon had not participated in the preparation of the trial. (App. 33-34).

Following the removal of Wagner, the ire and antagonism of the court towards Mr. Wagner was transferred to Mr. Meldon (App. 33-34). The action of the court created such an intimidating influence that Mr. Meldon's concern about representing the interests of the client was then and there in opposition to protecting his own interests in avoiding disbarment by the court. (App. 33). In *Glasser v. United States*, 315 U.S. 60 (1942) this Court stated that a conflict of interests may exist in any situation in which an attorney's decisions in the conduct of the defense are, or may be, influenced by concern for the effect of those decisions on another. He is unable to bring "entire devotion" to the interest of one defendant. In the instant case, Mr. Meldon's decision was influenced, first, by lack of preparation and, second, by the Court's attitude toward him.

In the instant case the defendant was aware of the duplicitous position Mr. Meldon was in. He did not acquiesce or consent to being represented any further

by Mr. Meldon. He did not waive his right to be represented by effective counsel of his choice, The defendant continually tried to get Mr. Wagner reinstated (App. 2, defendant's motions for reinstatement of attorney Maurice Wagner, February 26, 1973).

In the volatile situation that existed at the time the court's attention focused on Mr. Meldon (App. 33-34), he was placed in the uneasy position of not being wanted by the defendant nor being able to devote his full talents as vigorous advocate. This position is particularly evident in counsel's decision to accept the suggestion made by the Court (App. 39-40) and move for mistrial on behalf of the defendant. Mr. Meldon's interest in acquiescing in the suggestions of the trial court was in direct conflict with any interest he may have had in effectively representing the interests of the defendant. *Glasser v. United States, supra.*

The government concedes for argument that "judicial error may have influenced" the decision to move for a mistrial (Pet. brief 24). However, the government urges that any test of "voluntariness" is inappropriate in the context of the instant case (Pet. brief 26). the Government cites for support of this proposition *United States v. Tateo*, 377 U.S. 463 (1964). The government's emphasis on *Tateo* is misplaced. *Tateo* merely extended the rule of *United States v. Ball, Supra,* to include collateral attacks. Thus, after *Tateo* a defendant who attacks his conviction collaterally should be treated the same as one who attacks his conviction directly. The majority of this Court likened *Tateo's* situation to a reversed conviction rather than to the mistrial situation. The government's emphasis upon the defendant's reaction to a potentially prejudicial situation as in



*Tateo* tends to cloud the true issue here. The issue in the instant case whether the trial judge has unnecessarily deprived the defendant of any opportunity to have his trial completed by a particular tribunal. *Wade v. Hunter, Supra,* at 689. As footnote eleven in *Jorn* points out, the defendant in *Tateo* was not foreclosed from exercising his option of going to the jury of his choice; that option was effectively foreclosed in *Dinitz.*

The option to go forth with a reasonable defense was prevented by the trial judge's action in removing Wagner, and inquiring of Meldon what part he played in preparing the defense theory that resulted in Wagner's removal. (App. 32-33). In point of fact, the trial judge injected his interpretation of the defense theory into the path of defendant; resulting in confusion and removal of the one attorney hired as an expert trial advocate. "Wagner then *intending* to tell the jury of an extortion attempt against defendant which he (Wagner) was *prepared* to argue to the jury involved the government agent . . ." Order of Judge Middlebrooks, (Pet. App. 33a) (Emphasis added). The record is void of any mention of intent on the part of Mr. Wagner to tie in the extortion attempt to the government agent. (App. 31). As the court below noted in footnote eleven:

> It is not at all clear that the discord between the court and Wagner was not the result of a basic misunderstanding. The Court was only concerned with the existence of proof that the undercover agent Cox was the same man who had picked up the bundle left for the extortionist. If the court ever considered that Wagner may have been urging a broader contention – that Dinitz had been set up for the criminal contact with Cox or a

> confederate, to extort funds from him – it is not apparent from the transcript. (Pet. App. 17a)

The granting of a mistrial was improper in that the defendant did not acquiesce in the motion nor was the defendant present at the hearing on the motion. As noted above, the Fifth Amendment right against being twice placed in jeopardy for the same offense is founded upon a defendant's valued right to have his trial completed by a particular tribunal. *United States v. Jorn, Supra.* Thus, a trial court's discretion to declare a mistrial and discharge a duly impaneled jury can only be exercised when there is a manifest necessity to do so. *United States v. Perez, supra.* (See Argument II, *infra.*) or when the defendant validly waives his constitutional right to proceed before a duly impaneled jury. In the instant case, the record does not support the Government's contention that the defendant himself ever waived his right against double jeopardy (Pet. brief 19) (Motion to Dismiss App. 2). The record is silent as to defendant's position on mistrial. The record indicates that the Court never asked the defendant if he desired a mistrial (App. 40-44), although the court was aware that the defendant was present outside of chambers during the in-chamber discussion of a mistrial (App. 40-42).[6] Assuming for argument's sake that a waiver could have cured the fundamental error created by the trial judge, the court was, nevertheless, under a duty to

[6] Respondent has maintained that he had no actual knowledge of the mistrial motion by Meldon. (App. 22, Feb. 26, 1973, Defendant's Motion to Dismiss). The court of appeals specifically did not reach that issue in deciding this case (Pet. App. 12a, Fn. 8), and so, that issue is not discussed in detail herein.



clearly ascertain whether a proper waiver of a constitutional right had occurred, *Johnson v. Zerbst,* 304 U.S. 458 (1938), and

> "a waiver of one's constitutional right cannot be inferred from a silent record, and the courts must indulge every reasonable presumption against waiver of fundamental constitutional rights." *United States v. Aurbach,* 420 F.2d 921, 924 (5th Cir. 1969).

See also *Glasser v. United States, supra,* at 70. To deny defendant his constitutional protections in view of the unique circumstances leading to the in-chambers discussion of mistrial without determining his specific desire is to "condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused." *Glasser v. United States, Supra,* at 72, See also *McKissick v. United States,* 379 F.2d 754 (5th Cir. 1967).

What are the unique circumstances that should have alerted the Court to inquire of defendant his position with respect to a waiver of a fundamental constitutional right? *Cf. Drope v. Missouri,* ____ U.S. ____ 95 S. Ct. 896 (1975). First the defendant hired an experienced trial attorney. Second, the record demonstrates that Mr. Meldon, hired in the capacity as "Solicitor," was no longer involved in an aggressive defense once Mr. Wagner was removed. (App. 37-39) Third, the Court was aware that Mr. Meldon no longer wanted to in fact did not represent the best interests of the defendant (Pet. App. 34a-35a). Fourth, the record is silent as to any direct inquiry of defendant to determine his wishes with respect to a mistrial.

On this latter point it is important to note that after Mr. Wagner was excluded, the defendant was forced in

effect, to be his own attorney. This fact, although recognized by the trial court, (Pet. App. 34a-35a) was never taken into account during any of the proceedings following removal of defendant's chief counsel.

The prejudice to the defendant in this case was having retained counsel removed by the court for reasons that cannot overcome the constitutional command of the Sixth Amendment and having that counsel replaced by one who acquiesced in a mistrial when from the record that attorney was unprepared to represent the defendant and the defendant did not want the attorney to represent him. The defendant consistently contended that the mistrial resulted from the court's initial over-extension of its authority in removing counsel Wagner from the courtroom. The in-chambers proceedings resulted in a mistrial to the prejudice of defendant in that he was not represented by an attorney of his choice or an attorney who had the defendant's best interests in mind. This Court has said that the Constitution does not contemplate that the accused shall be dependent for legal assistance upon an attorney with divided loyalties; rather, the Sixth Amendment requires "undivided allegiance and faithful devoted service" *Von Moltke v. Gillies*, 332 U.S. 708, 725-726 (1948); see also *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962).

As the Circuit Court noted in *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963):

> It has been pointed out that courts indulge every reasonable presumption against waiver of constitutional rights, and that we do not presume acquiescence in the loss of fundamental rights. This protecting duly imposes the serious and weighty responsibility upon the trial judge of



> determining whether there is an intelligent and competent waiver by the accused. *Johnson v. Zerbst*, . . . This means that where the defendant is available, the serious and weighty responsibility of determining whether he wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make an intelligent and competent waiver. *Id.* at 631.

**C. Assuming Respondent moved for a mistrial, such motion is immaterial in view of the trial courts prior *sua sponte* act of removing trial counsel.**

The standard used to determine the propriety of a mistrial declaration when made on the defendant's own motion was set forth in *United States v. Jorn, supra*:

> Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution; even if defendant's motion is necessitated by prosecutional or judicial error. *Id.* at 486.

However, this Court in *Jorn* did recognize exceptions to the general rule. One exception was noted in footnote twelve wherein this court stated:

> Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred. *Id.* at 486.

The Government argues that the exception discussed in *Jorn* is the only circumstance in which judicial error grave enough to necessitate a defendant's mistrial

motion will bar reprosecution (Pet. brief 19-20). If the Government's position were taken literally, it would *first*, require an appellate court to determine conclusively that the error of the judge or prosecutor was motivated solely by a desire to avoid an acquittal. It would not otherwise permit an examination of the seriousness of the error. *Second*, it would ignore judicial or prosecutional vindictiveness or ineptitude. See Jaworski, *Judicial Intimidation: A Threat To The Advocate's Independence*, 1 Litigation 11 (The Journal of the Section of Litigation, American Bar Association) (Winter 1975). The government would permit an inept or vindictive trial judge to subject a defendant to an endless number of retrials so long as the errors involved resulted in defendant's being compelled to submit mistrial motions and as long as a reviewing court could not discover from the record that the trial judge acted out of a clear desire to avoid an acquittal. *Third*, the government's position is contrary to the spirit of *Illinois v. Somerville*, *supra*, in which this court once again rejected the "rigid mechanical" approach to double jeopardy issues. See also, *Serfass v. United States*, ____ U.S. ____, 95 S. Ct. 1055 (1975). *Fourth*, the government's argument ignores the precise language of *Jorn*. There is nothing in *Jorn* to indicate that this court intended to establish an absolute, inflexible rule of law, with the only exception to the rule being mentioned in a footnote. *Jorn* leads to the conclusion that this court was setting forth a general rule as to the circumstances within which a defendant may be reprosecuted. It is submitted that the exception cited in footnote twelve was merely one instance in which the general rule would not control.



> It is also clear that recognition that the defendant can be reprosecuted for the same offense does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. *United States v. Jorn*, *supra* at 484.

It is reasonable to assume, therefore, that this court anticipated situations arising in which the application of the general rule in *Jorn* would work undue hardship on the defendant and consequently would require recognition of exceptions.

The policy reasons for permitting retrial after a defendant moves for a mistrial are especially applicable where a defendant's own gross misconduct is the cause of the mistrial. They are equally applicable in situations in which the defendant's mistrial motion results from relatively minor procedural errors arising during the course of trial. In the latter case, there is no reason for barring retrial because the defendant's ability, procedurally, to conduct his own defense has not been impaired and his choice to abort the first proceeding is a very real one. (Pet. brief 31 n. 19). Retrial is also permitted where the judicial error in question does not substantially increase the risk of defendant's conviction in the first proceeding. *United States v. Tateo*, *supra*. In *Tateo*, the error at issue did not affect the defendant's right to complete his trial before the first jury and possibly be acquitted. Rather, the error related solely to what would happen if the defendant were convicted. In electing to plead guilty in the first trial, the defendant was exercising a very real option. The trial judge's error in *Tateo* did not leave the defendant in a position in which he had no choice but to move for a mistrial.

Accordingly, retrial was permitted because the defendant's guilty plea represented a truly voluntary choice. The error in *Tateo* did not deprive the defendant of any constitutionally-guaranteed right and had no effect upon his procedural ability to proceed before the first jury.

In contrast, where a defendant's motion for mistrial is the direct result of an avoidable, fundamental error committed by the trial judge, the effect of which is to wholly disable the defendant from conducting any defense whatsoever, a very different type of analysis is required. The government, as noted *supra*, contends that all errors committed at trial, other than those involving over-reaching designed to avoid an acquittal, resulting in a defendant's mistrial motion, will not bar reprosecution. (Pet. brief 19)

The major flaw in the government's position is best illustrated by the cases it cites in support of its position. (Pet. brief 31 fn. 19). In *Roberts v. United States*, 477 F.2d 544 (8th Cir. 1973), defendant moved for a mistrial after the trial judge had improperly commented upon the trial tactics of defense counsel. In *United States v. Kwitek*, 467 F.2d, 222 (7th Cir. 1972), defendant's motion for mistrial resulted from a finding that the jury had access to the defendant's criminal record. In *United States ex rel. Montgomery v. Brierly*, 414 F.2d 552 (3d Cir. 1969), improper comment by the prosecutor in his closing statement served as grounds for defendant's mistrial motion. In *United States v. Henderson*, 439 F.2d 531 (D.C. Cir. 1970) defendant's motion was predicated upon a comment by the prosecutor that he planned to rebut the testimony of the defendant by calling the defendant's mother to



testify, then failed to do so. In all of the cases discussed above, reprosecution was held not to be barred by the Double Jeopardy provision of the Fifth Amendment. The government correctly contends that these types of errors, in the absence of prosecutorial or judicial over-reaching, would fall within the general rule articulated in *Jorn*. From this, however, the government argues that if the errors in these cases were not sufficient to bar reprosecution, then *no* trial errors should be held sufficient.

However, there is a clear distinction to consider. The cases cited by the government in support of its position involve prejudice by error. In *Tateo*, for example, defendant had an option open to him, he could have moved for a mistrial or elected to proceed with the first trial in the face of perceived prejudice. Proper court instructions could, in many instances, have saved the first trial from prejudice. The errors complained of in those cases in no way affected the defendant's constitutionally guaranteed procedural right to conduct his defense or present his theory of the case to the chosen first jury through an able trial counsel. In contrast, the case at bar involved an error by the trial judge that goes to the heart of the guilt determining process, an error that had the effect of depriving the defendant of his constitutionally guaranteed right to counsel, an error made without any consideration of alternatives or one defendant's valued right to proceed with his chosen jury, and also his chosen counsel. The error, once made and never reconsidered, placed the defendant in a position in which he had no alternative other than to move for a mistrial The error once made and not recinded could not be cured either by jury

instruction or mistrial. Thus a mistrial motion on the part of defendant is an involuntary reaction to the loss of (1) a constitutional right and (2) a theory of defense aimed at acquittal. The record demonstrates that when the trial judge removed Wagner for beginning a theory of defense thought to be improper by the judge, that theory, i.e. that the defendant had been set up for the criminal contact by someone who planned to extort money from him, (Pet. App. 17a, fn. 11) was foreclosed to any trial attorney following Wagner appearing on behalf of Dinitz (App. 32-33). It is suggested that the action of the trial judge in refusing to consider defense theories as relevant was action taken to avoid the possibility of acquittal, since the only purpose in presenting a theory on behalf of defendant was to get an acquittal. Furthermore, reprosecution is barred by the judicial error of removing Wagner, ignoring at the time of removal the fundamental right of the defendant, thus placing the defendant in a position where his only alternative was to move for a mistrial.

> Research does not disclose any case in which the granting of a mistrial for misconduct of defense counsel has been upheld, although conceivably such action would be proper in case of misconduct going to the very vitals of the trial itself, for example, if the defendant for his counsel attempted to tamper with the jury. Minor misconduct of defense counsel, such as overstepping the limit set by the court for the examination of a witness, does not under the authorities warrant a mistrial thereby depriving the defendant of his right to sesure [sic] a verdict from the jury that had been sworn to try him. *United States v. Whitlow*, 110 F.Supp. 871, 876 (D.D.C. 1953)



In summary, assuming the defendant consented to the mistrial, unless this court is willing to accept the absolute test sought by the government, a different standard of analysis must be applied to judicial errors which relegate the defendant's ability to conduct his own defense. As the court below noted, this standard of analysis flows from *Jorn* and the reference in *Jorn* to judicial errors which do not bar reprosecutions. Judicial errors which do not bar reprosecuting are those which leave the defendant with some reasonable alternative to moving for a mistrial. It is no alternative, as the government would have this court believe, to play off the Fifth Amendment prohibition against double jeopardy with the Sixth Amendment right to counsel. *Simmons v. United States*, 390 U.S. 377 (1968).

The policy considerations allowing retrial are predicated upon the assumption that the defendant was presented with some form of meaningful option involving a selection between more than one reasonable alternative.

The *en banc* court below correctly concluded that the defendant was placed in a position where, because of grave judicial error alone, the only course open to him was to move for a mistrial.

> The judge's action, taken without defendant's provocation or consent, had the effect of depriving him of effective assistance of counsel thereby making further conduct of the trial impossible. (Pet. App. 26a-27a)

The dicta from *United States v. Jorn, supra,* does not encompass the extraordinary circumstances of the present case, in which judicial error alone, rather than defendant's exercise of any option to stop or go

forward, took away his valued right to have his trial completed by a particular tribunal. (Pet. App. 27a)

## II.

## THE COURT BELOW CORRECTLY CONCLUDED THAT A MANIFEST NECESSITY TO DECLARE A MISTRIAL DID NOT EXIST AND THAT JUDICIAL ERROR ALONE TOOK AWAY RESPONDENT'S VALUED RIGHT UNDER THE FIFTH AMENDMENT TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL.

As the government notes, a criminal trial is an inherently complex process, vulnerable to human and mechanical influences and failures; neither the defendant nor the Government are entitled to an error-free trial. Thus as *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824) pointed out, if there were no exceptions to the double jeopardy provision of the Fifth Amendment, the burden upon the government to insure a perfect error free trial would be too great. Furthermore, the ends of public justice would not be served by refusing to permit reprosecution when unavoidable events or technicalities result in a trial being aborted. *United States v. Perez, supra; Wade v. Hunter*, 336 U.S. 684 (1949); *Illinois v. Somerville*, 410 U.S. 458 (1973). Since 1824, this Court has articulated an exception to double jeopardy, which recognizes unavoidable circumstances, and recognizes that, if retrial were not permitted, the ends of public justice would not be achieved. The significant focus for the reviewing



court has always been upon the action of a trial judge who aborts a trial prior to verdict. The reviewing court must consider whether, when taking all of the circumstances into consideration, there was a manifest necessity for the decision; that is, the ends of public justice would have otherwise been defeated. *United States v. Perez, supra*, at 580. If a manifest necessity is found to exist, retrial is permitted, and lack of consent on the part of a defendant is immaterial.

Since *Perez*, this Court has had the difficult task of: (1) protecting the intent behind the Fifth Amendment's prohibition against twice being placed in jeopardy and (2) maximizing the trial judge's discretion in order to serve the ends of public justice. Thus, in *Gori v. United States*, 367 U.S. 364 (1961) this Court stressed the maximization of the trial judge's discretion where the declaration of a mistrial was in the sole interest of the defendant. As the majority argued:

> Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment .... Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. *Id* at 369.

In *Gori* the mistrial was declared in order to protect the defendant from supposedly prejudicial evidence. The focus after *Gori* was upon an extension beyond the particular facts of that case. In *Downum v. United States*, 372 U.S. 734 (1963), the prosecuting attorney's request for a mistrial was based upon the absence of a key government witness. *Id.* at 735. The discovery,

after the impanelling of the jury, rendered useless two of the six offenses charged. A motion for a mistrial was granted over defendant's objection. This Court, although declining to establish a specific rule, did examine the facts and conclude that reprosecution could not take place. *Id.* at 738. *Downum* reaffirms this court's position that mistrial must be considered on a case by case basis, and only after viable alternatives have been explored will the reviewing court reach its conclusion as to the correctness of the appealed from action. See also *United States ex rel Russo v. Superior Court of New Jersey* 483 F.2d 7 (3rd Cir. 1973); Note, *Mistrial and Double Jeopardy*, 49 N.Y.U.L.Rev. 937,942-948 (1974). This is precisely what the court below did in the instant case. Viable alternatives were not considered. The trial judge refused to reconsider his order banishing Mr. Wagner and exercise his power of contempt, *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); refused to permit an appeal to consider the propriety of his actions (App. 41); refused to consider a continuance for longer than twenty-four hours (App. 34-35); refused to determine dispassionately whether Mr. Wagner's actions warranted such reaction (App. 41); See *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) and *Illinois v. Allen*, 397 U.S. 337 (1970). As the Circuit Court below found, there had been no indication in the record that the trial judge felt that the jury had been prejudiced (Pet. app. 15a).

In *Downum*, the alternatives open to the trial judge were to declare a mistrial, dismiss the two affected counts, proceed with the trial on the other four counts or send the entire case to the jury. There the prosecutor indicated in open court that alternatives to a



mistrial would likely result in total acquittal. *Id.* at 742-743 (Clark, J., dissenting). In *Downum* a mistrial would not benefit the defendant, in fact, it would benefit only the prosecution. Under the circumstances such as in *Downum* this court has been unwilling to extend the solicitous attitude of *Gori* to the government.

In *United States v. Jorn*, relied upon by the court below, this Court adopted a policy of greater appellate scrutiny, noting that an examination into "party benefitting" would not suffice in determining if a retrial would violate the right against double jeopardy. Mr. Justice Harlan indicated that the policies behind double jeopardy cannot be confined solely to prevention of prosecutorial or judicial overreaching." *Id.* at 484. As the lower court in *Dinitz* noted, when, as in *Jorn*, the court *sua sponte* declares a mistrial, the valued right of the defendant to have his cause tried by the first jury has been abridged. *United States v. Dinitz*, (Pet. App. 27a) See also *United States v. Jorn, supra*, at 484.

As the plurality in *Jorn* pointed out:

> The *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. *Id.* at 485.

Thus the command of *Jorn*, that a trial judge consider procedural alternatives to mistrial before it can be said that a trial has been properly aborted, was not met in the instant case. Dissenting in *Jorn*, Mr. Justice Stewart argued that the issue of abuse of discretion should turn upon:

> . . . Whether there (had) been an abuse of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishments of the crime. *Id.* at 492.

In *Jorn*, Mr. Justice Stewart could not find where the defendant had suffered harm, since a mistrial had been declared for the benefit of the witnesses. In the case at bar, however, a valued right of defendant's had been removed by the trial judge: a right to be represented by his experienced, retained trial counsel; a right that goes to the heart of the guilt determining process, see, *e.g. Gideon v. Wainwright*, 372 U.S. 335 (1963).

In *Illinois v. Somerville, supra*, this Court continued its case by case construction of the manifest necessity doctrine. *Somerville* however, differs in that it was a statute proceeding and, although this Court stressed the analysis of manifest necessity, it nevertheless reflected a doctrine of federalism that respects state criminal rules of procedure against federal intervention. *Id.* at 468. Cf. *Huffman v. Pursue*, _____U.S._____, 95 S. Ct. 1200 (1975). The majority in *Somerville* noted that:

> the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementations of that policy in this manner could be manipulated so as to prejudice the defendant. *Id.* at 469.

As to the latter point, the majority, in basing its conclusion upon the fact that Illinois law made it impossible to amend the indictment, found manifest necessity for a mistrial because no curative measure was available. In citing *Wade v. Hunter, supra*, and *United States v. Jorn, supra*, the majority in *Somerville*



supported the *Jorn* concept that requires a trial judge to attempt to find curative procedural alternatives. *Illinois v. Somerville, supra*, at 465-466. *Somerville* holds that a mistrial is proper "if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious *procedural* error in the trial." *Id.* at 465. (Emphasis added)

This Court in *Jorn* pointed to the extremes that must be present in order to overcome the defendant's right not to be subjected repeatedly to the ordeal of prosecutions: *United States v. Perez, supra*, (retrial not barred where jurors unable to agree); *Simmons v. United States* 142 U.S. 148 (1892), (retrial not barred where a letter published in a newspaper rendered juror's impartiality doubtful); *Logan v. United States*, 144 U.S. 263 (1892), (retrial not barred where forty hours of deliberation did not result in a verdict); *Thompson v. United States* 155 U.S. 271 (1894), (retrial not barred where jury discharged because one juror had served on the grand jury indicting the defendant); *Wade v. Hunter, supra* (retrial not barred where the military court martial proceedings was discharged due to tactical necessities in the field); and *Gori v. United States, supra*, (retrial not barred where mistrial declared in the sole interest of the defendant.)

The case law from *Perez* to *Somerville* clearly presents the competing policies of "manifest necessity" declarations based upon the ends of public justice, and the rights of defendants to have their cases determined without unnecessary ordeal.

The focus of this court in *Somerville* was upon a mechanical technical failure, and although eschewing

the application of a mechanical formula to be applied in every case, this Court outlined a "general approach" to mistrial double jeopardy cases premised on the "public justice" policy of *Perez* and the cautionary note that:

> The determination by the trial court to abort a criminal proceeding where jeopardy has attached is not one to be lightly undertaken, since the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one. *Id.* at 471-472.

The instant case is clearly distinguished from the line of cases culminating in *Somerville*. As the Court of Appeals noted, although the tactics of Mr. Wagner may have been "vexatious": ". . . it certainly cannot be said that, individually or cumulatively, they would have made an impartial verdict impossible." (Pet. App. 15a). Even if the action of defendant's trial counsel could be viewed as intentionally designed to improperly affect the jury, the record below shows the jury *never heard* the remarks of trial counsel termed by the judge "character assasination." At the time of the trial judge's declaration of this mistrial, an impartial verdict was still possible, and, therefore, an unbridled power to banish counsel cannot be supported by the "ends of public justice" policy of *Perez* and *Somerville*.

The second and more variegated line of cases arising from *Perez* fall under the substantive "manifest necessity" doctrine. These cases involve situations where the declaration of a mistrial is based upon a *sua sponte* determination by the trial judge that circumstances have developed at trial which create a "manifest necessity" for mistrial. The "manifest necessity" doctrine is



directed to a broad spectrum of "error", encompassing prosecutorial and judicial error whether intentional or unintentional. Since the improper declaration of a mistrial immunizes the defendant from further prosecution, a *sua sponte* determination by the trial judge should only be reached "in very extraordinary and striking circumstances." *Downum v. United States, supra*, at 736. This court has upheld such findings of manifest necessity for mistrial when the record clearly reflects that the trial judge's determination was not based on a ruling or procedure which would lend itself to prosecutorial manipulation or constitute an abuse of judicial discretion. *United States v. Jorn, supra. Downum* recognized the inherent prejudice in jury discharge and the stringent standards to be applied in assessing the scope of judicial discretion to declare a mistrial based upon the manifest necessity doctrine:

> The discretion to discharge the jury before it has reached a verdict is to be exercised "only in very extraordinary and striking circumstances," to use the words of Mr. Justice Story in United States v. Coolidge, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is "not against being twice punished but against being twice put in jeopardy." *United States v. Ball*, 163 U.S. 662, 669. *Id.* at 736.

The doctrine of manifest necessity acts as an absolute bar to judicial action which forecloses the defendant's right to proceed to verdict. In *Jorn, supra,* the Court indicated that circumstances may arise in which judicial error or impropriety, not sufficient to constitute over-reaching, *will* nonetheless bar reprosecution – even when the mistrial has in fact been declared at the defendant's request. *Jorn* further amplifies this position:

> But it is also clear that recognition that the defendant can be reprosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. *Id.* at 485.

The mere fact of the defendant's mouthing a motion for mistrial does not foreclose inquiry into the defendant's motivation for so acting and, more importantly, does not foreclose the possibility that a second trial may be barred. The application of a mechanical test which would look only to the act and not to the basis upon which it is premised, would fly in the face of this Court's rejection of any mechanistic rigid approach to the mistrial – double jeopardy problem in *Somerville.*

The government contends that the declaration of a mistrial was "manifestly necessary" because the defendant was unwilling to permit his remaining counsel to represent him. (Pet. brief 33). This approach overlooks that the remaining counsel was under threat of disbarment, unprepared to conduct the trial, and not selected by the defendant to act as his *trial* counsel. (See Argument I, *supra*). By focusing on the result, rather than the cause, the government diverts attention from the critical fact: that the trial judge's removal of defendant's trial counsel compelled defendant to proceed without representation and thereby foreclosed him from reasonably or fairly presenting his case to the jury and proceeding to verdict. This is not a case, as is *United States v. Tateo, supra* where *sua sponte* action of the trial judge, although invalidating the defendant's guilty plea, did not deny the defendant the opportunity to proceed to verdict before the empanelled jury. In the



case at bar, the dismissal of defendant's trial counsel foreclosed presentation of his defense to a jury – any jury.

> Usually, the declaration of a mistrial is contemporaneous with the event which in the court's judgment operates to make a mistrial necessary. As a result, the appellate court normally tests to determine whether the precipitating event created the requisite manifest necessity to abort the trial. The instant case does not fit this mold. The actions of the court in banishing Wagner and threatening Meldon inexorably led the trial down the path to mistrial. As the government forcefully argues manifest necessity was present when the mistrial was finally granted, but we would be wrong to focus the inquiry there. The die was cast with the trial judge's response to the conduct of defense counsel. (Pet. App. 12a)

The government found this shift of focus, from conditions existent at the time the mistrial was declared to the error itself necessitating the declaration, to be a radical departure from what it termed "the standard evolved by this Court." (Pet. brief. 12-13) Such a position is inappropriate to this Court's recent decisions in *Jorn* and *Somerville.* Furthermore, *Jorn* in particular would belie the government's apparent position that the trial judge's assessment of "manifest necessity" forecloses appellate review of the basis for his determination. The imposition of such a categorical rule of review would act as an effective bar to the detection of prosecutorial or judicial impropriety in all but the most blatant instances. More importantly, the adoption of the government's position would necessitate an overruling of *Jorn*, since this Court recognized in that

decision that the scope of judicial discretion in the declaration of a mistrial *is* subject to strict scrutiny by appellate courts.

In the instant case:

> Since the court's actions at the time of Wagner's banishment made the subsequent grant of a mistrial inevitable, appellate review must center on these actions rather than on the resulting declaration. Dismissal of an attorney in the midst of a criminal trial is not per se wrong. The discretion reposed in the trial court to see that the proceedings before it accord justice to the litigants is, in the abstract, broad enough to encompass such a removal. For example if defense counsel by his actions so prejudices the jury trying his client that manifest necessity exists to declare a mistrial, he may be expelled and a mistrial declared. The fact that the mistrial may be attributed to the absence of counsel is of no moment. Despite such formal characterization, the ultimate cause of the mistrial remains the counsel-provoked jury prejudice. Additionally, it is possible that an attorney's conduct can be so disruptive of the orderly processes of justice as to require his removal from the proceedings and an ensuing mistrial. Again, the manifest necessity for declaring a mistrial would be found in the state of affairs created by counsel before the court takes action. Here our scrutiny must first be directed to the impact on the jury of Wagner's activity at this point to determine if jury prejudice can sustain the ousting of Wagner and the threats of a similar fate for Meldon. (Pet. App. 14a-15a)

Since, as noted above, the jury *never heard* the remarks upon which the trial judge based his expulsion of Wagner, it is evident that it was the action of the



trial judge himself which created the "manifest necessity" for mistrial. Defendant's acquiescence was in no real sense a consensual act since he had no option to continue to verdict.

The Government also contends that there is no distinction between error damaging to the defendant and unintentional error (Pet. brief 38). This conclusion ignores the findings of this Court in *Downum, Jorn* and *Somerville.* It completely fails to distinguish between the type of technical procedural error addressed in *Somerville* and error arising from an abuse of judicial discretion, such as formed the basis for this court's decision in *Downum* and *Jorn.* See, also, *Thomas v. Beasley*, 491 F.2d 507 (6th Cir. 1974); *McNeal v. Hollowell,* 481 F.2d 1145 (5th Cir. 1973); *United States ex rel Russo v. Superior Court of New Jersey,* 483 F.2d 7 (3rd Cir. 1973); *Carsey v. United States*, 392 F.2d 810 (D.C. Cir. 1967); *United States v. Whitlow,* 110 F. Supp. 871 (D.C. 1953); *Espinoza v. District Court,* 506 P.2d 131 (Colo. 1973); *State v. Burruell*, 401 P.2d 733 (Ariz. 1965); *Armentrout v. State,* 15 N.E.2d 363 (Ind. 1938); *State v. Whitman*, 74 P.2d 696 (Utah 1937.)

In *Somerville*, the error noted by the trial court was under State law, incurable, guaranteeing reversal on appeal. As noted earlier, the error in the instant case, assuming Wagner's remarks to have had the most deleterious effect, was wholly curable by the trial judge. Therefore, the actions of the trial judge in response to anticipated misconduct on the part of the defendant's trial counsel "had the effect of rendering Dinitz unable

to conduct his defense."[7] (Pet. App. 13a) The mistrial was the result of the conduct of the trial judge. Since there was no manifest necessity for such a mistrial declaration, the court below was correct in its conclusion that any retrial must be barred by the double jeopardy provision of the Fifth Amendment to the United States Constitution.

## CONCLUSION

The Government throughout its argument makes a basic assumption that the mistrial flowed directly from the defense motion. The court below sitting as a panel and then *en banc* disposed of this factual issue by concluding that the defendant was not the cause of the mistrial; rather it was the judge who created the error that resulted in the mistrial. It was the judge who failed to evaluate alternatives to the mistrial and it was the judge who created an atmosphere so adverse to defendant that he could not proceed with his defense.

[7]Hypothetically, the trial judge might, with equal reasonableness, have discharged the jury instead of Mr. Wagner, to prevent the potential of jury prejudice, and given the defendant the option of proceeding before the court without a jury, or consenting to a mistrial. The government could then argue that it is unforeseeable that a defendant would not elect to proceed before the court without a jury. Reversing the appellate decision in the instant case could well vitiate the double jeopardy protection. Whenever a trial judge wished for whatever reason, to end a trial and subject a defendant to multiple prosecutions, he need merely banish counsel, the jury, or both, and then give the defendant an "option" of proceeding or moving for a mistrial.



The assumption made by the Government that the mistrial was a direct result of a defense motion ignores the careful development of the unique facts of the instant case by the court below. As pointed out by that court, sitting *en banc*, the path to mistrial was paved by the actions of the trial judge, not by the respondent or his lead counsel. (Pet. App. 26a-27a) As this Court noted in *Brown v. United States*, 356 U.S. 148, 153 (1958), "Trial courts ... must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."

The Government has stressed that the defendant in moving for a mistrial waived his Fifth Amendment right not to be placed twice in jeopardy. A waiver, however, is the *voluntary* relinquishment of a known right. It is defendant's contention that the act of Mr. Meldon in moving for a mistrial could hardly be considered voluntary, and since it was by that time clear that the trial could not reasonably continue, the motion did not voluntarily relinquish a known right of the defendant.

The trial court was under a duty to clearly determine whether there had been a proper waiver of the defendant's constitutional right, *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States v. Aurbach*, 420 F.2d 921 (5th Cir. 1969); *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949), especially since the circumstances leading to the mistrial were created by the court in its unreasonable use of removal powers. The Government fails to recognize that the trial court had options available, short of the drastic act of removal. Any action that would have preserved the integrity of the guilt-determining process should have been followed before taking the drastic action of

removing the trial counsel aborting the trial. The fundamental error of the trial judge could have been cured at any time prior to the actual dismissal of the duly empaneled jury. A motion for a mistrial, bottomed upon explicit threats to the attorney and his client, can hardly be considered a voluntary waiver by the defendant. Indeed, the facts are clear, it was the effect of the trial court's action *sua sponte* that created the point of no return for the defendant.

From the facts the court below correctly concluded that the mistrial was not of defendant's doing, and indeed was the proximate and foreseeable result of the actions of the trial judge with regard to his treatment of Mr. Wagner and Mr. Meldon. Thus the only other possibility opened to the court to save itself from a double jeopardy claim based upon the commission of a fundamental error would have been to consider, as suggested by the Government, whether a *manifest necessity* existed.

In the instant case, the trial court by relying on the "manifest necessity" doctrine in support of its declaration of a mistrial concedes the possibility that the declaration was *sua sponte* and not the result of Mr. Meldon's motion. If the motion for a mistrial was *sua sponte*, the trial court went far beyond the scope of its discretion.

At the time of the removal of Mr. Wagner and the explicit threats to Mr. Meldon, there was no evidence of a manifest necessity to abort the trial. The jury had in no way been influenced by the exchange between the court and Mr. Wagner since, if for no other reason, the jury was *out* of the courtroom most of the time. The alleged misconduct of Wagner precipitating the mistrial



was his *anticipated* statement concerning an extortion attempt made against defendant. The other improper act attributed to Mr. Wagner was the interjection of his opinion before the jury concerning the credibility of a government witness. It should be reemphasized that just prior to that comment the United States attorney had interjected his own opinion as to the guilt of the defendant (App. 19). Mr. Wagner's comment resulted in a strong rebuke by the court, yet the prior personal observation to the jury by the Government passed without comment by the trial judge.

The Government suggests the question: what should the trial judge have done to avoid double jeopardy, once Mr. Wagner had been banished and Mr. Meldon intimidated? It is respectfully suggested that the experienced trial judge should not have reached that road. Once there, the trial judge could still have reinstated Mr. Wagner to conduct the defense.

The government suggests that as a practical matter the relinquishment of the first empaneled jury created very little harm. The double jeopardy provision guarantees the right of a defendant to complete his trial before a particular jury and without the ordeals of time, expense and emotional impact of a second trial balanced against society's interest in the fair administration of justice. *Illinois v. Somerville, supra.* The Fifth Amendment will not permit jury shopping. Furthermore, no societal interest can be served by granting trial judges the unbridled power to summarily remove attorneys from cases for proffering evidence, even if that evidence were ruled inadmissible.

> It has been repeatedly held that, whether the discharge of a jury arose from the arbitrary act of

> the court, or from some mere whim or caprice of judge or jury, or from some accident or blunder, it was immaterial; in either case the result would be the same – the discharge of the defendant. *State v. Turpin*, 54 Or. 367, 103 Pac. 438 (1901).

Furthermore, even assuming that misconduct can be inferred from the record in this case reprosecution of the defendant is nonetheless barred by the double jeopardy provisions of the Fifth Amendment. See *United States v. Whitlow*, 110 F. Supp. 871 (D.D.C. 1953); *State v. Whitman*, 93 Utah 557, 74 P.2d 696 (1937); *Lillard v. Commonwealth*, 267 S.W. 2d 712 (Ky. 1954); *McCabe v. Bronx County Court*, 199 NYS 2d 247 (1960); *Lewis v. State*, 45 2P.2d 892 (Alaska 1969); *Espinoza v. District Court*, 506 P.2d 131 (Col. 1973).

In every case where a mistrial was declared without the consent of the defendant, and reprosecution permitted, the mistrial had been declared because the jury could no longer reach a fair verdict. Where reprosecution has been barred, it has been so because the first jury was dismissed while it was still capable of reaching a fair verdict. In the instant case, it is respectfully urged that the comments of Mr. Wagner which the jury *never heard*, could in no way have prevented that jury from reaching a fair verdict; therefore, reprosecution of the defendant would place him in double jeopardy. Had the court below held otherwise, it would have in effect permitted the trial court to do in two steps what it could not constitutionally do in one. It would in fact have sanctioned the trial court's act of subjecting defendant to multiple reprosecutions, until such time as the



defendant either was represented by counsel approved by the trial judge, or until the defendant retained counsel who would neither make any objectionable comment before the jury, proffer inadmissible evidence, or present a theory of defense that the trial judge disapproved of. As the appeals court below intimated *that cannot be.*

In this case there is not even a suggestion by the trial judge that the original jury would have been unable to reach a just verdict, that a juror was biased, or that there was a real emergency that might necessitate aborting the trial. There is no evidence that the mistrial was necessitated by defendant's abuse of the judicial system, nor that it was declared in the sole interest of defendant, nor that there was any compelling government policy to be implemented by the declaration of a mistrial. Rather, the mistrial was declared because of alleged misconduct by the retained trial defense counsel and his resultant expulsion from the case, leaving the defendant with a Hobson's choice of affirming the court's unconstitutional act or proceeding without counsel. That choice was no choice at all. Thus as the court below held the action of the trial judge rendered defendant unable to conduct his defense and therefore the second trial placed him twice in jeopardy in violation of the Fifth Amendment. It is submitted that the holding of the court below is consistent with the decisions of this Court, especially *United States v. Jorn, supra, Illinois v. Somerville, supra,* and *United States v. Tateo*, 377 U.S. 463 (1964). See also, *United States ex rel Russo v. Superior Court of New Jersey*, 483 F.2d 7 (3rd Cir. 1973). The government has failed to construct a proper foundation upon which to build a case that

would overcome the judgment of the Fifth Circuit Court of Appeals sitting *en banc.*

Accordingly, it is respectfully submitted that the judgment of the Court of Appeals be affirmed.

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